At present forty to fifty boys can be kept at the farm and given healthful employment surrounded by the home influences of an inspiring director and his wife. The boys also have school work for part of the day. The farm school thus forms an important adjunct to our plans for training. At various times the league in its efforts for children's welfare has introduced and supported probation officers, night agents, vacation schools with their summer playgrounds, and a boys' club. At its last annual meeting the lecture by Dr. William Healy of Chicago did much to crystallize the decision to undertake the present study. It is thus endeavoring not only to help the delinquents more fully but to add in a small way to the constructive knowledge about the diagnosis, treatment and education of these embryonic law breakers.

J. B. MINER, University of Minnesota.

Is Vasectomy a Cruel and Unusual Punishment?—State of Washington, *Respondent, vs.* Peter Feilen, *Appellant.*

Appeal from a judgment of the superior court for King county, Main, J., entered September 30, 1911, upon a trial and conviction of rape. Affirmed.

Crow, J.—The defendant was convicted of the crime of statutory rape committed upon the person of a female child under the age of ten years and was sentenced to imprisonment for life in the state penitentiary. The final judgment and sentence from which he has appealed further ordered, adjudged, and decreed that: "An operation to be performed upon said Peter Feilen for the prevention of procreation, and the warden of the penitentiary of the state of Washington is hereby directed to have this order carried into effect at the said penitentiary by some qualified and capable surgeon by the operation known as vasectomy; said operation to be carefully and scientifically performed."

By his first assignment, appellant contends that the trial judge erred in submitting the case to the jury, for the reasons (1) that no degree of penetration was shown, and (2) that the testimony of his victim, the prosecuting witness, was not corroborated by such other evidence as tended to convict him of the crime charged. We find no merit in these contentions. The evidence will not be discussed or stated in this opinion, as no good purpose could be thereby served. We are convinced that, under the rule announced in *State v. Kincaid,* 27 Wash. Dec. 114, 124 Pac. 684, the evidence was sufficient to comply with the requirements of *Rem. & Bal. Code,* Section 2437. We are also satisfied that the evidence afforded that degree and character of corroboration required by Section 2155, *Rem. & Bal.,* and from all of the evidence we conclude that the only verdict that should have been returned was the one that the jury did return. The case was for the jury, and their verdict will not be disturbed.

Appellant was prosecuted under *Rem. & Bal. Code,* Section 2436, and the penalty of life imprisonment was properly imposed. *Rem. & Bal. Code,* Section 2287, provides that:

"Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation."

It was under the authority of this section that the trial judge ordered the operation of vasectomy, and appellant, by his remaining assignments, contends

that it is unconstitutional in that an operation for the prevention of procreation is a cruel punishment prohibited by art. 1, section 14, of the state constitution, which directs that "excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." As the statute does not prescribe any particular operation for the prevention of procreation, the trial judge ordered that the operation known as vasectomy be carefully and skillfully performed. The question then presented for our consideration is whether the operation of vasectomy, carefully and skillfully performed, must be judicially declared a cruel punishment forbidden by the constitution. No showing has been made to the effect that it will in fact subject appellant to any marked degree of physical torture, suffering or pain. That question was doubtless considered and passed upon by the legislature when it enacted the statute. Appellant further contends that the imposition of the alleged cruel punishment as a part of the sentence necessitates a reversal of the judgment. This would not be true, even though we were to hold the operation to be an infliction of cruel punishment, as the judgment of conviction would have to be affirmed with directions to enforce the penalty of life imprisonment. When a sentence is legal in one part and illegal in another, it is not open to controversy that the illegal, if separable, may be disregarded and the legal enforced. *United States v. Pridgeon,* 153, U. S. 48; *State v. Williams,* 77, Mo. 310, 313.

The crime of which appellant has been convicted is brutal, heinous and revolting, and one for which, if the legislature so determined, the death penalty might be inflicted without infringement of any constitutional inhibition. It is a crime for which, in some jurisdictions, the death penalty has been imposed. 33 *Cyc.* 1518. If for such a crime death would not be held a cruel punishment, then certainly any penalty less than death, devoid of physical torture, might also be inflicted. In the matter of penalties for criminal offenses the rule is that the discretion of the legislature will not be disturbed by the courts except in extreme cases.

"It would be an interference with matters left by the constitution to the legislative department of the government, for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. So long as they do not provide cruel and unusual punishments such as disgraced the civilization of former ages, and make one shudder with horror to read of them, as drawing, quartering, burning, etc., the constitution does not put any limit upon legislative discretion." *Whitten v. State,* 47 Ga. 297.

On the theory that modern scientific investigation shows that idiocy, insanity, imbecility, and criminality are congenital and hereditary, the legislatures of California, Connecticut, Indiana, Iowa, New Jersey, and perhaps other states, in the exercise of the police power, have enacted laws providing for the sterilization of idiots, insane, imbeciles, and habitual criminals. In the enforcement of these statutes vasectomy seems to be a common operation. Dr. Clark Bell, in an article on hereditary criminality and the asexualization of criminals, found at page 134, vol. 27, *Medico-Legal Journal,* quotes with approval the following language from an article contributed to *Pearson's Magazine* for November, 1909, by Warren W. Foster, senior judge of the court of general sessions of the peace of the county of New York:

"Vasectomy is known to the medical profession as 'an office operation' painlessly performed in a few minutes, under an anæsthetic (cocaine) through a skin

cut half an inch long, and entailing no wound infection, and no confinement to bed. 'It is less serious than the extraction of a tooth,' to quote from Dr. William D. Belfield, of Chicago, one of the pioneers in the movement for the sterilization of criminals by vasectomy, an opinion that finds ample corroboration among practitioners. * * * There appears to be a wonderful unanimity in favor of the prevention of their future propagation. The *Journal of the American Medical Association* recommends it, as does the Chicago Physicians' Club, the Southern District Medical Society, and the Chicago Society of Social Hygiene. The Chicago *Evening Post,* speaking of the Indiana law, says that it is one of the most important reforms before the people, that 'rarely has a big thing come with so little fanfare of the trumpets.' The Chicago *Tribune* says that 'the sterilization of defectives and habitual criminals is a measure of social economy.' The sterilization of convicts by vasectomy was actually performed for the first time in this country, so far as is known, in October, 1899, by Dr. H. C. Sharp, of Indianapolis, then physician to the Indiana State Reformatory at Jeffersonville, though the value of the operation for healing purposes had long been known. He continued to perform this operation with the consent of the convict (not by legislative authority) for some years. Influential physicians heard of his work and were so favorably impressed with it that they endorsed the movement which resulted in the passage of the law now upon the Indiana statute books. Dr. Sharp has this to say of this method of relief to society: 'Vasectomy consists of ligating and resecting a small portion of the *vas deferens.* The operation is indeed very simple and easy to perform; I do it without administering an anæsthetic, either general or local. It requires about three minutes' time to perform the operation and the subject returns to his work immediately, suffers no inconvenience, and is in no way impaired for his pursuit of life, liberty and happiness, but is effectively sterilized.'"

Must the operation of vasectomy thus approved by eminent scientific and legal writers, be necessarily held a cruel punishment under our constitutional restriction when applied to one guilty of the crime of which appellant has been convicted? Cruel punishments, in contemplation of such constitutional restriction, have been repeatedly discussed and defined, although we have not been cited to, nor have we been able to find, any case in which the operation of vasectomy has been discussed. In *State v. Woodward,* 68 W. Va. 66, 69 S. E. 385, a recent and well-considered case which may be consulted with much profit, Brannon, Justice, said:

"The legislature is clothed with power well nigh unlimited to define crimes and fix their punishments. So its enactments do not deprive of life, liberty or property without due process of law and the judgment of a man's peers its will is absolute. It can take life, it can take liberty, it can take property, for crime. 'The legislatures of the different states have the inherent power to prohibit and punish any act as a crime provided they do not violate the restrictions of the state and federal constitutions; and the courts cannot look further into the propriety of a penal statute than to ascertain whether the legislature had the power to enact it.' 12 *Cyc.* 136. 'The power of the legislature to impose fines and penalties for a violation of its statutory requirements is coeval with government.' *Mo. P. R. R. Co. v. Humes,* 115 U. S. 512. The legislature is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe. *Commonwealth v. Murphy,* 165 Mass. 66, *Southern Ex-*

press Co. v. Commonwealth, 92 Va. 66. For such a fundamental proposition I need cite no further authority. * * * What is meant by the provision against cruel and unusual punishment? It is hard to say definitely. Here is something prohibited, and in order to say what this is we must revert to the past to ascertain what is the evil to be remedied. Within the pale of due process the legislature has power to define crimes and fix punishments, great though they may be, limited only by the provision that they shall not be cruel or unusual or disproportionate to the character of the offense. Going back to ascertain what was intended by this constitutional provision the history of the law tells us of the terrible punishment visited by the ancient law upon convict criminals. In our days of advanced christianity and civilization this review is most interesting yet shocking and heart-rending."

The learned jurist then proceeds with the narration of the cruel punishments mentioned in 4 *Blackstone,* at pages 92, 327 and 377, and after citing and discussing the English Bill of Rights; *Whitten v. State,* 47 Ga. 301; *Aldridge Case,* 2 Va. Cases, 447; *Wyatt's Case,* 6 Rand 694; *In re Kemmler,* 136 U. S. 436, 446; *Wilkerson v. Utah,* 99 U. S. 130, 135; Cooley, Const. Lim. (4th ed.), 408; Wharton, Crim. Law (7th ed.), Section 3405; *Hobbs v. State,* 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774; *State v. Williams,* 77 Mo. 310; *Weems v. United States,* 217 U. S. 349; *O'Neil v. Vermont,* 144 U. S. 323; and other cases says:

"In short the text writers and cases say that the clause is aimed at those ancient punishments, those horrible, inhuman, barbarous inflictions."

In *In re O'Shea,* 11 Cal. App. 568, 105 Pac. 777, the California court of appeals for the first district said:

"Cruel and unusual punishments are punishments of a barbarous character and unknown to the common law. The word, when it first found place in the Bill of Rights, meant not a fine or imprisonment, or both, but such punishment as that inflicted by the whipping post, the pillory, burning at the stake, breaking on the wheel, and the like; or quartering the culprit, cutting off his nose, ears or limbs, or strangling him to death. It was such severe, cruel and unusual punishments as disgraced the civilization of former ages and made one shudder with horror to read of them. Cooley on Constitutional Limitations (7th ed.), p. 471, *et seq.; State v. McCauley,* 15 Cal. 429; *Whitten v. State,* 133 Ind. 404, 32 N. E. 1019; *State v. Williams,* 77 Mo. 310. 'The legislature is ordinarily the judge of the expediency of creating new crimes, and prescribing the punishment, whether light or severe.' *Commonwealth v. Murphy,* 165 Mass. 66, 42 N. E. 504, 52 Am. St. Rep. 496, 30 L. R. A. 734; *Southern Express Co. v. Com.,* 92 Va. 59, 22 S. E. 809, 41 L. R. A., 436."

Guided by the rule that, in the matter of penalties for criminal offenses, the courts will not disturb the discretion of the legislature save in extreme cases, we cannot hold that vasectomy is such a cruel punishment as cannot be inflicted upon appellant for the horrible and brutal crime of which he has been convicted.

The judgment is affirmed. Parker, Chadwick, and Gose, JJ., concur.

From STEVENSON SMITH, Seattle.

Criminal Attempts.—In a pamphlet with the above title W. H. Hitchler called attention to the difficulties encountered in formulating a proper definition of an attempt. Mr. Hitchler finds no satisfactory definition of an attempt in the books. In its essential elements an attempt consists of a criminal intent and a criminal act. The criminal act is composed of a physical and a mental element.